

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARLENE LALATAG,

Plaintiff,

v.

MONEY FIRST FINANCIAL SERVICES,  
INC.; et al.,

Defendants.

2:09-cv-02268-LRH-RJJ

ORDER

Before the court is defendants Quality Loan Service Corporation (“QLS”) and One West Bank’s (“One West”), as asset purchaser for IndyMac Bank, FSB (“IndyMac”), motion to dismiss filed on June 1, 2010. Doc. #25.<sup>1</sup> Plaintiff Marlene Lalatag (“Lalatag”) filed an opposition (Doc. #28) to which moving defendants replied (Doc. #31).

**I. Facts and Procedural History**

On April 5, 2006, Lalatag purchased real property through a loan with defendant Money First Financial Services, Inc. (“Money First”). The loan was secured by a note and deed of trust. Lalatag defaulted on the loan and defendants initiated non-judicial foreclosure proceedings.

On September 23, 2009, Lalatag filed a complaint in state court against defendants alleging seven causes of action: (1) lack of standing to initiate non-judicial foreclosure; (2) fraudulent

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<sup>1</sup> Refers to the court’s docket entry number.

1 misrepresentation; (3) fraudulent concealment; (4) unconscionability; (5) unjust enrichment and  
2 civil conspiracy; (6) quiet title; and (7) wrongful foreclosure. Doc. #1, Exhibit A. Thereafter,  
3 moving defendants filed a motion to dismiss all claims. Doc. #7.

4 Meanwhile, in late 2009, the United States Judicial Panel on Multi-District Litigation  
5 (“panel”) consolidated a series of cases in which plaintiffs alleged that MERS engaged in improper  
6 business practices when processing home loans. The panel assigned Judge James A. Teilborg  
7 (“Teilborg”) to oversee these cases and preside over all issues (discovery, dispositive motions,  
8 settlement) except for trials. *In re: Mortgage Electronic Registration Systems (MERS) Litigation*,  
9 MDL No. 2119.

10 On February 16, 2010, the panel issued a transfer order and consolidated the present action  
11 with the MDL litigation. Doc. #18. However, as part of the transfer order, the panel transferred only  
12 those claims that “relate to the formation and/or operation of MERS” and held that all other claims  
13 “unrelated to the formation and/or operation of the MERS system are separately and simultaneously  
14 remanded” to the district court in which they were first brought. *Id.*

15 On May 17, 2010, Judge Teilborg issued an initial remand order. Doc. #22. Pursuant to that  
16 order Judge Teilborg remanded: (1) claim 3 for fraudulent concealment; (2) claim 4 for  
17 unconscionability; and (3) claim 5 for unjust enrichment and civil conspiracy. *Id.* Thereafter,  
18 moving defendants filed a renewed motion to dismiss as to the remanded claims. Doc. #25.

## 19 **II. Legal Standard**

20 In considering “a motion to dismiss, all well-pleaded allegations of material fact are taken  
21 as true and construed in a light most favorable to the non-moving party.” *Wylar Summit P’ship v.*  
22 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court  
23 does not necessarily assume the truth of legal conclusions merely because they are cast in the form  
24 of factual allegations in a plaintiff’s complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752,  
25 754-55 (9th Cir. 1994).

1        There is a strong presumption against dismissing an action for failure to state a claim. *See*  
2   *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). “The issue is  
3   not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence  
4   in support of the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*  
5   *grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). However, a plaintiff’s obligation to  
6   provide the grounds of his entitlement to relief requires more than labels, conclusions, and a  
7   formulaic recitation of the elements of the cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S.  
8   Ct. 1955, 1965 (2007). “Factual allegations must be enough to raise a right to relief above the  
9   speculative level on the assumption that all the allegations in the complaint are true (even if  
10   doubtful in fact).” *Id.* (internal citations omitted).

### 11   **III.   Discussion**

#### 12   **Fraudulent Concealment**

13        “In alleging fraud or mistake, a party must state with particularity the circumstances  
14   constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading  
15   requirements a plaintiff must allege the particular concealment as well as which party was involved  
16   in the concealment and how. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th Cir. 1999);  
17   *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a plaintiff to  
18   allege the requisite who, what, where, when, and how of the fraud). Here, Lalatag fails to allege  
19   anything more than defendants concealed information from her. These allegations are insufficient  
20   to support a claim for fraudulent concealment.

#### 21   **Unconscionability**

22        Lalatag alleges that the deed of trust and mortgage note are unenforceable because they are  
23   unconscionable contracts made by defendants who knew she would be unable to make monthly  
24   mortgage payments when her interest rate changed. However, moving defendants were not  
25   involved in the origination of Lalatag’s mortgage loan and did not sign or cause to be signed the  
26

1 alleged unconscionable contract. Accordingly, Lalatag's complaint fails to state a cause of action  
2 against moving defendants related to the contract's alleged unconscionability.

### 3 **Civil Conspiracy**

4 To establish a claim for civil conspiracy, a plaintiff must establish: (1) the commission of an  
5 underlying tort; and (2) an agreement between the defendants to commit that tort. *GES, Inc. v.*  
6 *Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Further, the cause of action must be pled with particular  
7 specificity as to "the manner in which a defendant joined in the conspiracy and how he participated  
8 in it." *Arroyo v. Wheat*, 591 F. Supp. 141, 144 (D. Nev. 1984).

9 Here, Lalatag fails to plead a claim for civil conspiracy with the required specificity. Lalatag  
10 never identifies how each individual defendant participated or joined the conspiracy. Further,  
11 Lalatag does not clearly identify the underlying tort that defendants committed. Lalatag merely  
12 alleges that her loan was one of many executed in violation of the Nevada state laws. Therefore, the  
13 court finds that Lalatag has failed to sufficiently plead a claim for civil conspiracy with the requisite  
14 specificity.

### 15 **Unjust Enrichment**

16 To set forth a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly  
17 retained money or property of another against fundamental principles of equity. *See Asphalt Prods.*  
18 *Corp. v. All Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action for unjust  
19 enrichment cannot stand when there is an express written contract which guides that activities of  
20 the parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187  
21 (Nev. 1997).

22 Here, there was a written contract between the parties, namely, the deed of trust and  
23 mortgage note. These documents guided the interactions, obligations, and rights of the parties. As  
24 such, Lalatag cannot make a claim in equity for actions that are guided by contract she is a party to.  
25 *See LeasePartners Corp.*, 942 P.2d at 187-88.

1 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #25) is  
2 GRANTED. Defendants Quality Loan Service Corporation; One West Bank; and IndyMac Bank,  
3 FSB are DISMISSED as defendants to the remanded claims: (1) claim 3 for fraudulent  
4 concealment; (2) claim 4 for unconscionability; and (3) claim 5 for unjust enrichment and civil  
5 conspiracy.

6 IT IS FURTHER ORDERED that defendants' motion to dismiss (Doc. #7) is DENIED as  
7 moot.

8 IT IS SO ORDERED.

9 DATED this 20th day of July, 2010.



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12 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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